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No. 91-1340

Supreme Court, U.S.
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In The Supreme Court of the United States
October Term, 1991

WILLIAM H. DENNLER, et al.,

Petitioners,

v.

ROBERT S. TRIPPET, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 5

I. THE CIRCUMSTANCES OF THIS CASE DO NOT WARRANT CERTIORARI REVIEW OF THE PETITIONERS' CLAIMS UNDER §27A OF THE 1934 ACT 5

II. PETITIONERS' SECOND QUESTION DEMONSTRATES NO CONFLICT AMONG THE CIRCUITS, IS BASED PRIMARILY UPON FACTUAL ISSUES AND PRESENTS NO IMPORTANT FEDERAL OR CONSTITUTIONAL ISSUES 8

A. There Is No Conflict Among the Circuits 8

B. Petitioners' Second Question Is Based Primarily Upon Facts Properly Considered by the Tenth Circuit 9

C. The Tenth Circuit's Decision Does Not Violate the Seventh Amendment 11

D. The Tenth Circuit's Holding Does Not Violate Congressional Policies 14

III. THE DECISION OF THE TENTH CIRCUIT REGARDING §13 AND EQUITABLE ESTOPPEL IS NOT CONTRARY TO NOR IN CONFLICT WITH DECISIONS OF THIS COURT OR OF OTHER CIRCUITS 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases *Page*

Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036 (10th Cir. 1980) 14

Arneil v. Ramsey, 550 F.2d 774 (2d Cir. 1977) 8, 9

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, *reh'g denied*, 369 U.S. 882 (1962) 13

Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402 (2d Cir. 1975) 9

Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc., 584 F.2d 946 (10th Cir. 1978) 12

Bomba v. W. L. Belvidere. Inc., 579 F.2d 1067 (7th Cir. 1978) 16

Brady v. Southern R. Co., 320 U.S. 476 (1943) 12

Cerbone v. Int'l Ladies Garment Workers' Union, 768 F.2d 45 (2d Cir. 1985) 15

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 6

Curry v. A. H. Robins Co., 775 F.2d 212 (7th Cir. 1985) 12

In re Data Access Sys. Sec. Litigation, 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988) 7

English v. Pabst Brewing Co., 828 F.2d 1047 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988) 14

Gaudin v. KDI Corp., 576 F.2d 708 (6th Cir. 1978) 9

Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959) 14, 16

Hodges v. Snyder, 261 U.S. 600 (1923) 7

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) 7

Hupp v. Gray, 500 F.2d 993 (7th Cir. 1974) 9

Page

James B. Beam Distilling Co. v. Georgia, 501 U.S. ___, 111 S.Ct. 2439 (1991) 6

Jones v. Ford Motor Co., 599 F.2d 394 (10th Cir. 1979) 9

Katz v. Amos Treat & Co., 411 F.2d 1046 (2d Cir. 1969) 16

Kennedy v. Tallant, 710 F.2d 711 (11th Cir. 1983) 9

Kramas v. Sec. Gas & Oil, Inc., 672 F.2d 766 (9th Cir.), *cert. denied*, 459 U.S. 1035 (1982) 12

Lampf Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. ___, 111 S.Ct. 2773, *reh'g denied*, 501 U.S. ___, 112 S.Ct. 27 (1991) 6, 14, 16

Lynch v. Universal Life Church, 775 F.2d 576 (4th Cir. 1985) 12

Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1949) 7

McCullough v. Virginia, 172 U.S. 102 (1898) 7

Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984) 12, 13

Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, *reh'g denied*, 386 U.S. 1027 (1967) 12, 13

NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 6, 13

Randall v. Loftsgaarden, 478 U.S. 647 (1986) 7

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 11

Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1979) 8, 9, 11, 13

SEC v. Seaboard Corp., 677 F.2d 1301 (9th Cir. 1982) 15

Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 501 U.S. ___, 111 S.Ct. 2887 (1991) 16

Page

Stewart v. Keyes, 295 U.S. 403, *reh'g denied*, 296 U.S. 661 (1935) 7

Summer v. Land & Leisure, Inc., 664 F.2d 965 (5th Cir. Unit B 1981), *cert. denied sub nom, Arthur Young & Co. v. Summer*, 458 U.S. 1106 (1982) 15

Tull v. United States, 481 U.S. 412 (1987) 12

United States v. Johnston, 268 U.S. 220 (1925) 11

United States v. Klein, 80 U.S. (13 Wall) 128 (1872) 7

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) 7

Zobel v. Williams, 457 U.S. 55 (1982) 7

Constitutional Provisions

U.S. Const. art. III 2, 7

U.S. Const. art. VI cl. 2 ..... 2, 7

U.S. Const. amend. V 2, 7

U.S. Const. amend. VII 1, 11-13

U.S. Const. amend. XIV 2, 7

Statutes

15 U.S.C. §77k 1, 8

15 U.S.C. §77m 1, 2, 8, 14, 15, 16

15 U.S.C. §78i(e) 1, 2, 8, 16

15 U.S.C. §78j(b) 1, 6

15 U.S.C. §78aa-1 ..... 1, 2, 5-7

28 U.S.C. §2106 13

Other Authorities

S. 543, 102d Cong., 1st Sess. §1126 (1991) 14

5A J. Moore, J. Lucas, *Moore's Federal Practice*, ¶50.07[1] (2d ed. 1992) 13

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BRIEF IN OPPOSITION

These respondents respectfully request that the petition for a writ of certiorari be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition for writ involves §11 and §13 of the Securities Act of 1933 (15 U.S.C. §77k, §77m) ("the 1933 Act"), §9(e) and §10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78i(e), §78j(b)) ("the 1934 Act") and an issue involving the seventh amendment of the United States Constitution. Petitioners raise no constitutional issues relating to §27A, which was added as an amendment to the 1934 Act by enactment of §476 of the FDIC Improvement Act of 1991 (Pub. L. No. 102-252). 15 U.S.C. §78aa-1. Respondents submit that petitioners' §27A question is not a basis for granting the petition. However, the following constitutional issues may become pertinent if a writ of certiorari

is issued on that question: (a) separation of powers clause; (b) due process clause of the fifth amendment; (c) equal protection principles; and (d) the supremacy clause. U.S. Const art. III, VI cl. 2, amend. V, XIV.

Pursuant to Supreme Court Rule 29.4(b), respondents suggest that 28 U.S.C. §2403(a) may be applicable if certiorari is granted to consider §27A. The United States Court of Appeals for the Tenth Circuit did not certify to the Attorney General that the constitutionality of an act of Congress was drawn into question.

STATEMENT OF THE CASE

This counter statement is necessary to provide a complete understanding of the issues before this Court. The Tenth Circuit's July 22, 1991 and October 21, 1991 decisions were based solely upon the issue of the statutes of limitation under §13 of the 1933 Act (App. 1-50a)[1] and §9(e) of the 1934 Act. (App. 51a-55a) Therefore, it was not necessary for the Tenth Circuit to reach other issues raised by these respondents on appeal.

From 1964 through 1972, Home-Stake Production Company ("Home-Stake"), through its Program Operating Companies ("POCs"), offered units of participation in oil and gas drilling programs ("units") which were registered under the 1933 Act.

E. M. Kunkel was the outside auditor of Home-Stake for audit years 1963-1965 (1964-1966 Program years), and an employee of Home-Stake during 1968-1971. Norman C. Cross, Jr. was the outside auditor for Home-Stake for the audit years 1968-1970 (1969-1971 Program years). Cross and Company was the outside auditor of Home-Stake for the audit year 1971 (1972 Program year). Kothe & Eagleton, Inc. served as special counsel for Home-Stake in 1971, and assisted in the preparation of the 1971 Registration Statement. (Doc. 2577; ¶¶46, 49, 50)

Home-Stake's executives sold units in face-to-face transactions with sophisticated investors in the highest income tax

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[1] "App." refers to the separately bound appendix filed by petitioners. Citations to the record below are as follows: the trial transcript is T. ___; trial exhibits are Ex. ___; and pleadings filed in the district court are cited by docket number as Doc. ___. References to transcripts of hearings are Hr., followed by the date and page.

brackets. (T. 317-24, 353-56) Prospectuses were provided for the 1964-1972 Program years. (Ex. RD 26-27, 41-47, 410) In addition, program books, which described the drilling programs and the tax benefits being offered, were presented as a part of the sales literature for the 1964-1970 POCs. (Ex. RD 1, 3-8)

Petitioners state that the Home-Stake "Ponzi scheme forms the basis of petitioners' case." (Pet. 16) There is no finding or evidence in the record supporting the petitioners' statement that Home-Stake operated a "Ponzi scheme" to defraud investors.[2] (Pet. 4)

The Tenth Circuit's opinion did not base its determination that petitioners were on "inquiry notice" solely upon the "SEC enforcement action," as petitioners assert. (Pet. 15) Rather, the court based its decision upon the SEC fraud action and other significant facts in the record. (App. 26a, 27a, 43a n. 36, 43-46a)

The voluntary payments which petitioners refer to as the "Home-Stake fraud," were designated by Home-Stake as "pro rev" or "program revenue" payments. These payments were not represented by Home-Stake as income from oil and gas production, as petitioners argue. (Pet. 4, 25) Rather, they were represented as income from sources "other" than oil and gas production. Full disclosure of pro rev payments was made by Norman C. Cross, Jr. to the IRS, which approved and allowed pro rev payments as costs in the years that the payments were made. (Ex. OOP 54, Offer of Proof of IRS Agents; T. 3609-14)

Home-Stake disclosed the pro rev payments to petitioners in many ways, including the following:

> (1) The 1971 Prospectus filed with the SEC explained the results of prior programs as well as pro rev payments (Ex. RD 27, p. 53) by stating:
>
> > Cash returned to Investors includes funds derived from production and a return upon their capital contributions to the Programs as payment for the

---

[2] The Court: "[W]hether this is a Ponzi scheme or not I did not determine. That's argument of counsel, it is not a factual situation . . . What counsel denominated it to be is something totally outside the record and irrelevant to me. (Hr. 1-26-90, pp. 5-6)

> use of the contributed funds by Home-Stake . . . In the case of the 1965 to 1969 Programs, inclusive . . . funds derived from the latter sources have constituted virtually all of the net cash returned to Investors.
>
> (2) The stubs attached to the quarterly checks from Home-Stake, received by the investors, labeled pro rev payments as "other" than oil and gas production. (T. 825)
>
> (3) The tax summaries, mailed to investors for preparation of their tax returns, described the pro rev payments as funds from sources other than oil and gas production which did not qualify for a depletion allowance tax deduction. (Ex. RD 584-636)
>
> (4) The payout tables, included in the prospectuses, accurately described Home-Stake's development failures in prior programs which were contrary to the optimistic projections in other sales materials. (*Compare* Ex. RD 42, pp. 51-54 *with* Ex. RD 3 pp. 13-14; *compare* Ex. RD 41, pp. 18-21A *with* Ex. RD 1, pp. 12, 13; Ex. RD 27, pp. 51-56; Ex. RD 26, pp. 55, 56)

Furthermore, in December 1970, the SEC issued a formal Order of Investigation of the 1970 POC (Ex. RD 662) and, on February 11, 1971, filed a complaint in the district court charging Home-Stake, its officers and directors, and the 1970 POC with violation of the anti-fraud provisions of the federal securities statutes. (Ex. RD 657) In April 1971, the Final Judgment of Permanent Injunction was entered. (Ex. RD 659)

On April 30, 1971, the Rescission Offer Prospectus and a copy of the final judgment, describing the SEC fraud charges, were mailed to each of the investors in the 1970 POC. Two hundred seventy-nine (279) investors accepted the rescission offer and received the return of their investments, plus accrued interest. (Doc. 2577, ¶¶116, 117)

The 1971 Prospectus, effective November 3, 1971 (Ex. RD 27), and the 1972 Prospectus, effective October 11, 1972 (Ex. RD 26), also disclosed to the 1971 and 1972 investors details of the SEC fraud charges.

Six lawsuits were filed between June 1971 and January 1973 by various investors alleging that Home-Stake violated the anti-fraud provisions of the federal securities laws. (App. 45a n. 39)

On September 20, 1973, Home-Stake petitioned for reorganization under Chapter X of the Bankruptcy Act. Over $20,000,000 was distributed to the investors by the Trustee in the reorganization proceeding. (Doc. 2679, Ex. F) There never was an adjudication that Home-Stake was bankrupt. (T. 3477)

In addition to the Trustee's distributions, the investors actually received: (a) their promised tax benefits of over $42,000,000; (b) $12,000,000 in distributions from Home-Stake prior to the reorganization proceeding; and (c) over $29,000,000 from settlements. (Doc. 2679, Ex. F; Doc. 3163)

REASONS FOR DENYING THE WRIT

I. THE CIRCUMSTANCES OF THIS CASE DO NOT WARRANT CERTIORARI REVIEW OF THE PETITIONERS' CLAIMS UNDER §27A OF THE 1934 ACT.

The petitioners' first basis for certiorari review is the post-judgment enactment of §27A. (Pet. 11) The application of §27A to this action does not present an important federal question and its review will not result in dispositive relief in petitioners' favor.

Petitioners do not and cannot claim a conflict among the circuits regarding §27A. Furthermore, there is no claim that the Tenth Circuit's decision so departs from the limits of normal judicial proceedings as to require this Court's supervision. The Tenth Circuit's January 6, 1992 order denying reinstatement contains no opinion interpreting or applying §27A and is not published. (App. 56a) Thus, that order applies only to the parties in this case and provides no precedent for other cases.

Petitioners incorrectly contend that application of §27A automatically requires reversal of the Tenth Circuit's judgment. (Pet. 11, 14) Instead, §27A imposes conditions on its application. First, §27A requires application of the "limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991." The

principles of retroactivity that existed on June 19, 1991, prior to this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S.Ct. 2439 (1991), required the satisfaction of three tests before a change in the law could be limited to nonretroactive application. These tests were established in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). Under §27A, the effect of *Lampf Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. ___, 111 S.Ct. 2773, *reh'g denied*, 112 S.Ct. 27 (1991) on this case requires application of the three *Chevron* tests to the facts of this case.

Second, once a court has identified the limitation period appropriate under §27A, it must then examine the facts of the particular case to determine when the period began to run, i.e., when an investor first acquired either actual or constructive knowledge constituting inquiry notice of a basis for the claim. The court must then determine if the suit was timely filed. Therefore, the effect of §27A on §10(b) cases is not uniform. Rather, §27A's application depends on the facts of the particular case.

This case-by-case application of §27A means that appeals from decisions regarding its application will necessarily require a factual analysis of the particular record. Consequently, resolution of the issue in one case is not likely to provide precedent for other cases. Therefore, this case has little, if any, importance beyond the interests of its parties.

Issues of importance only to the parties in a case and not involving the resolution of conflicting appellate decisions or matters affecting the public generally, do not warrant certiorari review. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951). Certiorari is not warranted to review conflicting evidence. *Id.* at 503.

The posture of this case does not support the petitioners' claim that §27A requires reversal of the Tenth Circuit's judgment. Unlike many cases decided on statute of limitation grounds, this case was tried on the merits. Respondents appealed to the Tenth Circuit on a complete trial record and raised several dispositive issues. One was that the action was time-barred by the very Oklahoma statute petitioners now claim must be applied under §27A. Another issue was whether the district court erroneously

excluded the tax and other benefits petitioners actually received from the computation of their "actual damages." *See Randall v. Loftsgaarden*, 478 U.S. 647 (1986). The value of these excluded benefits was more than double the actual damages computed and awarded by the district court (*see supra* at p. 5). (Doc. 2679, Ex. F)

Respondents briefed, argued, and submitted these and other issues to the Tenth Circuit prior to this Court's opinion in *Lampf*. With the benefit of the entire record and the arguments on all issues raised from that record, the Tenth Circuit, on three separate occasions, concluded that the judgments must be reversed and the actions dismissed. Thus, even if petitioners were correct regarding the effect of §27A, its application to this case provides no basis for certiorari review.

Various litigants in district courts have challenged the application, interpretation and the constitutionality of §27A.[3] However, there are no decisions by circuit courts of appeals on §27A, therefore, it is not presently ripe for this Court's review. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1949).

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[3] Challenges, including respondents' objections to petitioners' pending Motion to Reinstate Section 10(b) Judgments in the district court, include constitutional claims that: (a) §27A operates as a legislative review of judicial action and accordingly violates the separation of powers clause of the Constitution, see e.g. *United States v. Klein*, 80 U.S. (13 Wall) 128 (1872) and *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); (b) §27A violates the principle that "the private rights of parties which have been vested by a judgment of a court cannot be taken away by subsequent legislation" (*Hodges v. Snyder*, 261 U.S. 600, 603 (1923); *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898)) and violates the due process clause by depriving defendants of vested property rights (*see e.g. Stewart v. Keyes*, 295 U.S. 403, *reh'g denied*, 296 U.S. 661 (1935)); (c) §27A violates the equal protection clause by creating an arbitrary and irrational classification (based on the differences in the laws existing on June 19, 1991 in the circuits which had adopted the *In re Data Access Sys. Sec. Litigation*, 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988) rationale prior to that date), see e.g. *Zobel v. Williams*, 457 U.S. 55, 64 (1982) and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); and/or (d) §27A violates the supremacy clause (U.S. Const. art. VI cl. 2) by elevating a conflicting state statute of limitations over an established federal statute of limitation. It is respondents' position that the district court has no jurisdiction to consider petitioners' motion to reinstate since the Tenth Circuit, a higher court, has already denied relief on the identical issues.

II. PETITIONERS' SECOND QUESTION DEMONSTRATES NO CONFLICT AMONG THE CIRCUITS, IS BASED PRIMARILY UPON FACTUAL ISSUES AND PRESENTS NO IMPORTANT FEDERAL OR CONSTITUTIONAL ISSUES.

A. There Is No Conflict Among the Circuits.

The second question as stated is limited exclusively to the application of the one-year limitation period[4] of §13 to petitioners' §11 claims.[5] The petitioners erroneously contend that the Tenth Circuit's opinion is in direct conflict with *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979). (Pet. 18-19) Petitioners misconstrue *Robertson* to hold that inquiry notice cannot be triggered by a "wholly distinct fraudulent scheme." (Pet. i, 18-19) To the contrary, the same circuit, in *Arneil v. Ramsey*, 550 F.2d 774, 781 (2d Cir. 1977), held that media coverage regarding violations of the record keeping provisions of the securities laws was sufficient to constitute inquiry notice of another independent fraud. *Robertson* does not overrule *Arneil*. *Robertson* discusses fraudulent concealment of a single underlying fraud, not two independent, actionable frauds, and therefore is inapposite. *Robertson*, 609 F.2d at 593.

Now, for the first time, petitioners argue that only the second SEC fraud suit put them on inquiry notice of these claims. Prior to this petition, they argued that it was a Wall Street Journal article reporting Home-Stake's filing for reorganization which put them on inquiry notice. (Doc 2135A) Obviously, petitioners have changed the event that they claim triggered inquiry notice for purposes of arguing a perceived conflict with *Robertson*. Such a conflict does not exist.

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[4] Even though the petitioners do not raise the one-year time-bar to investors other than those in the 1970-1972 Programs, the §11 claims of the investors in the 1964-1969 Programs are time-barred by the three-year rule of §13. (App. 38a)

[5] At footnote 11 (Pet. 15-16), petitioners allude to the decision of the Tenth Circuit as establishing a "pernicious precedent" claiming that §9(e) requires actual discovery in contrast to §13 which is triggered by constructive discovery. The interpretation of §9(e) is not within the scope of the second question presented, therefore, respondents do not address §9(e) herein.

B. Petitioners' Second Question Is Based Primarily Upon Facts Properly Considered by the Tenth Circuit.

Factors such as market conditions, legal actions, or adverse or contradictory information are sufficient to place an investor on inquiry notice and to commence the limitation period. *See Gaudin v. KDI Corp.*, 576 F.2d 708, 712 (6th Cir. 1978), *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975), *Hupp v. Gray*, 500 F.2d 993, 996-97 (7th Cir. 1974), and *Arneil*, 550 F.2d at 781, all cited with approval in *Robertson*, 609 F.2d at 587- 89. Furthermore, newspaper articles may be considered in determining inquiry notice. *Kennedy v. Tallant*, 710 F.2d 711, 716 (11th Cir. 1983); *Berry Petroleum*, 518 F.2d at 410. Finally, investor sophistication is a significant factor to be considered with regard to events sufficient to constitute inquiry notice. *Arneil*, 550 F.2d at 781; *Jones v. Ford Motor Co.*, 599 F.2d 394, 399 (10th Cir. 1979).

Here, all of these factual elements supporting inquiry notice were in the record on appeal and were considered by the Tenth Circuit. It found, as a matter of law (App. 43a), that the investors in the 1970, 1971, and 1972[6] POCs were placed on inquiry notice by the following events more than one year before their §11 claims were filed: (1) on February 11, 1971, the SEC sued Home-Stake for fraud (App. 26a); (2) on February 16, 1971, the SEC fraud action was reported in the Wall Street Journal (App. 27a); (3) on April 30, 1971, the court-ordered rescission offer, which described the SEC fraud action, was mailed to the 1970 participants (App. 27a); (4) the 1971 and 1972 prospectuses described

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[6] The 1971 POC claims against Kothe & Eagleton and the 1972 POC claims were added by amendment on May 24, 1974, more than one year after the original complaint in this action was filed and, therefore, are time-barred. (App. 47a)

the SEC fraud action[7] (App. 43a n. 36); and (5) the 1970, 1971,[8] and the 1972 class representatives, all of whom were sophisticated investors, admitted knowledge of these facts (*see supra* at pp. 2, 4). (App. 43-46a)

The record before the Tenth Circuit demonstrated the petitioners' constructive knowledge of the alleged fraud, including, *inter alia*: 1) the inconsistencies between the prospectuses and the program books regarding income projections; 2) the check stubs and tax summaries which described pro rev as income other than from oil and gas production; and 3) the annual summaries of the status of the development in the prior programs which clearly demonstrated inconsistencies between Home-Stake's projections and actual development (*see supra* at pp. 3-4). Even if the petitioners were not placed on inquiry notice on the date of their investment as a result of the inconsistencies between the prospectuses and program books, they were on at least inquiry notice from the date they received the first check stub or tax summary which reported their income as being from other than oil and gas production.

The Tenth Circuit held that these facts collectively constituted " 'great glowering clouds'. . . sufficient to put plaintiffs on notice that something was amiss" and were "enough of a 'storm warning' to start the clock as a matter of law." (App. 43a, 47a) The Tenth Circuit recognized what the three class representatives knew and noted that each admitted that they "made their own decisions based as much on tax considerations as investment concerns." (App. 44-46a)

Petitioners also argue that constructive discovery could not have occurred prior to September, 1973. (Pet. 8) However, their

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[7] Petitioners argue that the Tenth Circuit's holding would result in the 1971 investors being on inquiry notice before their purchase, and the 1972 investors' claims being time-barred before their purchase. (Pet. 15 n. 10) They later concede that the Tenth Circuit held that statute of limitations starts on the purchase date. (Pet. 13, 17-18) When an investor has information sufficient to constitute inquiry notice prior to purchase, the statute of limitation begins to run on the date of purchase.

[8] Warren, the 1971 class representative, invested in all the Home-Stake programs from 1964-1972, and received the Rescission Offer, which he rejected. (App. 44a) He sold two units back to Home-Stake under his buy-back agreement in 1966 and 1967. (Doc. 2577 ¶19)

suit for fraud was filed on March 30, 1973, six months earlier. Petitioners' argument that constructive discovery could first occur after actual discovery is incredible. The unambiguous statutory language establishes that constructive discovery will commence the running of the one-year limitation of §13 for claims under §11 of the 1933 Act.

The existence of constructive discovery depends upon facts unique to each case. *Robertson*, 609 F.2d at 591. As this Court has recognized, it does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The question of when inquiry notice occurred is a fact-dependent issue peculiar to these petitioners, and this Court "does [not] sit for the benefit of particular litigants." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

C. The Tenth Circuit's Decision Does Not Violate the Seventh Amendment.

Petitioners state that the Tenth Circuit's holding as to when inquiry notice occurred as a matter of law "flies in the face of common sense . . . and improperly invades the province of the jury." (Pet. 17) If anything "flies in the face of common sense," it is the jury finding that constructive discovery of the fraud could not have occurred prior to September, 1973, which ignores the fact that petitioners filed their securities fraud claims six months earlier.[9]

Petitioners attempt to defend the jury finding that the 1970-1972 class representatives "could not have discovered the facts . . . prior to September 1973," six months after the complaint was filed. (Pet. 14) Yet, numerous investors filed six lawsuits from June 1971 through January 1973 alleging violations by Home-Stake of the anti-fraud provisions of the federal securities laws. (App. 45a n. 39) The jury's finding is so clearly flawed that it was properly rejected by the Tenth Circuit as a matter

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[9] Petitioners mistakenly state that respondents did not challenge the jury instructions concerning the statute of limitations nor the form of the special jury interrogatories. (Pet. 20 n. 13) However, respondents objected to both at the trial (T. 4042.14-.16, 4042.28-.29) and appealed these statute of limitations issues (Appt. Joint Br. pp. 7-22).

of law. *Accord Lynch v. Universal Life Church*, 775 F.2d 576, 578-79 (4th Cir. 1985).

Based upon the whole record, the Tenth Circuit correctly concluded that "a single question of law predominates our review." (App. 24a) This Court has long recognized that "if the evidence is uncontradicted and raises only a question of law," there is no violation of the seventh amendment right to a jury trial when an appellate court reverses and directs entry of judgment. *Tull v. United States*, 481 U.S. 412, 419 (1987); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321-22, *reh'g denied*, 386 U.S. 1027 (1967).

There is no usurpation of a jury function nor is there a violation of the seventh amendment where the material facts are undisputed, and the court establishes, as a matter of law, that a statute of limitations bars the action. *Curry v. A. H. Robins Co.*, 775 F.2d 212, 217 (7th Cir. 1985).

The Tenth Circuit was correct in setting aside the jury findings, applying the standards of review set forth in *Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc.*, 584 F.2d 946, 951 (10th Cir. 1978), because "both the facts and the inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion." *Brady v. Southern R. Co.*, 320 U.S. 476, 479-80 (1943).

Petitioners state that the Tenth Circuit's opinion conflicts with "well established principles governing appellate review of jury verdicts in security (sic) law cases" (Pet. 19), citing *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984). However, *Mosesian* recognized that a statute of limitations question may be decided as a matter of law "when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct." *Mosesian*, 717 F.2d at 877, citing *Kramas v. Sec. Gas & Oil, Inc.*, 672 F.2d 766, 770 (9th Cir.), *cert. denied*, 459 U.S. 1035 (1982). Petitioners have not and cannot identify a conflict among the circuits. The Ninth Circuit in *Mosesian* cited cases from the Sixth and Seventh Circuits holding that this question may be decided as a matter of law. 727 F.2d at 878. *Mosesian*

is distinguishable because the Ninth Circuit, in reversing the judgment notwithstanding the verdict, held that the verdict was "reasonable and [was] supported by substantial evidence." 727 F.2d at 879. The facts here do not support a similar conclusion.

The power of any court, trial or appellate, to direct entry of judgment notwithstanding a verdict, without violating the seventh amendment, is well established. *Neely*, 386 U.S. at 322. *See also* 5A J. *Moore, J. Lucas, Moore's Federal Practice*, ¶50.07[1] at pp. 50-61 through 50-64 (2d ed. 1992) and the citations therein. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360, 363-64, *reh'g. denied*, 369 U.S. 882 (1962) and *Robertson*, 609 F.2d at 592, cited by petitioners, are inapposite since the evidence relevant to the issue was controverted.

Here, notwithstanding the verdict, the Tenth Circuit found, as a matter of law, after a full review of the record, that the 1970, 1971, and 1972 claims were time-barred. (App. 47a) Its decision was proper. This Court has held that a court of appeals, in reversing the denial of a defendant's motion for judgment-notwithstanding the verdict, may itself order dismissal and direct entry of judgment for the defendant, citing to 28 U.S.C. §2106. *Neely*, 386 U.S. at 322. Respondents took all steps necessary to preserve the right to seek summary reversal of the district court's judgment by the Tenth Circuit. (Doc. 2534, 2537, 2546, T. 2976-78, 2982-95, 3003-08 - directed verdict motions; T. 3008 - motions denied; App. 60-75a, 78-146a, 60-75a - judgments; Doc. 2716, 2718, 2720 - JNOV motions).

Petitioners' second issue does not raise any legal question on the appropriate standard for judgment notwithstanding the verdict, nor does it raise a constitutional question. Instead, this issue is fact-based, i.e., whether a review of the record establishes that there are no material fact questions which would preclude an appellate court from entering judgment. Fact questions are not a basis for granting certiorari. *NLRB*, 340 U.S. at 503.

D. The Tenth Circuit's Holding Does Not Violate Congressional Policies.

The Tenth Circuit's holding does not subvert the policies of the federal securities laws or impede free access to the capital markets as petitioners suggest. The public policy issues raised by petitioners (Pet. 17-18), should be addressed to Congress, rather than to this Court, and they are not a proper basis for certiorari review.

Congress, by the enactment of §13, has stated the public policy to be that any fact (including an SEC fraud action) may be relied upon by a court to determine the date constructive discovery commences. Congressional policy establishes that the duty to diligently investigate remains with the investor, not the SEC.

The question of diligent investigation is determined on a case-by-case basis within that policy on statutes of limitations issues. The Tenth Circuit decision followed those policies. After *Lampf*, Congress had the opportunity to and did again address these policy considerations, but did not modify them in any way. S. 543, 102d Cong., 1st Sess. §1126 (1991).

III. THE DECISION OF THE TENTH CIRCUIT REGARDING §13 AND EQUITABLE ESTOPPEL IS NOT CONTRARY TO NOR IN CONFLICT WITH DECISIONS OF THIS COURT OR OF OTHER CIRCUITS.

This Court and the various circuits uniformly define equitable estoppel as it relates to statutes of limitations to require proof that a plaintiff knew of a cause of action and, because of reliance upon a defendant's acts, failed to file the known cause of action in a timely manner. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235 (1959); *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1043 n.7 (10th Cir. 1980); *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988).

Petitioners misconstrue the distinction between equitable tolling and equitable estoppel. (Pet. 22) The difference is explained

in *Cerbone v. Int'l Ladies Garment Workers' Union*, 768 F.2d 45, 49-50 (2d Cir. 1985):

> Unlike equitable tolling, which is involved in cases where the plaintiff is ignorant of his cause of action because of the defendant's fraudulent concealment, equitable estoppel is invoked in cases where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused him to delay in bringing his lawsuit (citations omitted).

The facts enumerated by petitioners do not support the application of equitable estoppel. Petitioners tacitly acknowledge that the facts of this case do not give rise to equitable estoppel. Petitioners deny knowledge of their claims until six months after the suit was filed, and, therefore, they could not have been fraudulently induced to forego filing a known claim.

Petitioners have never argued that they knew of their claims but delayed filing suit in reliance upon any acts or representations of the respondents. Rather, petitioners argue that the actions of some respondents prevented them "from discovering" their claims (Pet. 24), that quarterly payments from other than oil and gas production were made "to conceal the absence of program development and the lack of profitable operations" (Pet. 25), and that the rescission offer constituted an act of "concealment" (Pet. 26).

Petitioners argue facts which might be the basis for equitable tolling in an appropriate situation, but those facts do not support equitable estoppel. Equitable tolling, however, will not extend the three-year limitation period under §13. *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 968 (5th Cir. Unit B 1981), *cert. denied sub nom, Arthur Young & Co. v. Summer*, 458 U.S. 1106 (1982); *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1308 (9th Cir. 1982).

The Tenth Circuit correctly concluded that the 1964-1969 investors "were barred from suit by the three-year statute of repose" since the suit was not filed until March 30, 1973. (App. 39a) This conclusion is compelled by the plain language of §13 which states: "[i]n no event shall any such action be brought to enforce a liability created under section 11 . . . more than three

years after the security was bona fide offered to the public . . . ." The phrase "in no event" means what it says. *See Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391-92 (7th Cir. 1990), *cert. denied*, 501 U.S. ___, 111 S.Ct. 2887 (1991). This Court acknowledged the concept of §13 when it construed the three-year provision of §9(e) as a "period of repose" not subject to any "tolling principles." *Lampf*, 111 S.Ct. at 2781-82.

The Tenth Circuit's opinion is not in conflict with *Glus*, *Bomba v. W. L. Belvidere. Inc.*, 579 F.2d 1067 (7th Cir. 1978), *Katz v. Amos Treat & Co.*, 411 F.2d 1046 (2d Cir. 1969), or the other cases cited by petitioners. (Pet. 24 n. 17) Those cases each involved statements by defendants that caused the plaintiffs not to file suit, even though plaintiffs knew of their claims before the limitations period elapsed. The courts applied traditional standards of equitable estoppel.

It is indisputable that all circuits, which have considered the application of equitable estoppel to avoid the three-year limitation period of §13, have rejected the principle. *See Short*, 908 F.2d at 1391 (collecting cases). The Tenth Circuit's ruling is consistent with those decisions. (App. 32a n. 15, 38-39a) Furthermore, the Tenth Circuit accurately noted that the district court's decision (which is the same as the petitioners' contention before this Court) "is recognized in the treatises as the 'sole exception' to the three-year absolute bar under section 13." (App. 32a n. 15)

As *Glus* noted, the application of equitable estoppel is to be determined upon the facts of each case. 359 U.S. at 234. The Tenth Circuit correctly held upon the facts of this case, that respondents were not equitably estopped from asserting the statute of repose. The decision by the Tenth Circuit is consistent with *Glus* and with circuit decisions interpreting §13 and similar statutes of limitation.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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